1986

Clair W. and Gladys Judd Family Limited Partnership v. Bernell L. Hutchings, Ronald J. Sherman and Mrs. Ronald J. Sherman : Brief of Appellant

Utah Supreme Court

Don R. Petersen; Howard, Lewis and Petersen; Attorneys for Appellants.
Michael J. Petro; Aldrich, Nelson, Weight and Esplin; Attorneys for Respondents.

IN THE SUPREME COURT OF THE STATE OF UTAH

CLAIR W. and GLADYS JUDD FAMILY LIMITED PARTNERSHIP,	:	
DOCKET NO. 860100		
Plaintiffs and Appellants,	:	
vs.	:	Case No. 860100
	:	Category No. 13b
BERNELL L. HUTCHINGS, MRS. BERNELL HUTCHINGS, RONALD J. SHERMAN and MRS. RONALD J. SHERMAN,	:	
Defendants and Respondents.	:	

BRIEF OF APPELLANTS

Appeal from Judgment, January 23, 1986
Fourth Judicial District Court, Utah County
Honorable George E. Ballif, District Judge

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ATTORNEYS FOR RESPONDENTS

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2. Whether the trial court erred by failing to resolve the disputed deed lines by reference to priority of title.

3. Whether the trial court erred in finding boundary by acquiescence where the fence had been moved, where the period of time was insufficient and where the parties were never in acquiescence as to whether the fence line represented the boundary line.

4. Whether the trial court erred in not allowing a conversation with a prior landowner admissible as an exception to hearsay.

5. Whether the trial court erred by failing to recognize priority of title in the Judd deed.

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BRIEF OF APPELLANTS

STATEMENT OF FACTS

This action involved a boundary dispute in a rural area of Springville, Utah. The plaintiffs, the Judd Family Partnership (hereinafter "Judds"), filed a Complaint against the Hutchings and Shermans (hereinafter "Hutchings") seeking to quiet title, to relocate the fence line and to obtain damages. (R. 1-3). The Hutchings counterclaimed for basically the same thing; however, no affirmative defenses, such as estoppel, were set forth in the Hutchings' Answer and Counterclaim. (R. 12-15). At trial, on September 5, 1985, the Judds sought to quiet title on the deed line set forth by the description on their deed, while the Hutchings sought to quiet title on the existing fence line.

For clarity, counsel filed with the trial court a Stipulation as to the issues and attached a copy of the pertinent survey. (R. 43-46). Attached hereto as Exhibit "A" is said Stipulation and survey copy. The Judd property is located to the south and the Hutchings to the north. The description on the Judd deed places the boundary at one point, the description on the Hutchings deed places the boundary at another point, and the fence line is at yet another place--see Addendum.

The Stipulation states that a survey was performed by a Donald C. Cole, based upon both the Hutchings' and Judds' deeds and that the only boundary in dispute is the southern Hutchings boundary and the Judd northern boundary, and that further, the only issues before the trial court were the location of the proper boundary, the payment of the expense for relocating the fence should that prove necessary, and the possibility of damages awarded to the Judds by reason of the disputed boundary. (R. 43-46, 128-129).

Undisputed testimony at trial revealed that the Judd property and description originated from a patent in 1833 and that the Sherman (predecessors of the Hutchings) property and overlapping description originated from a patent in 1884. (R. 136-7). The overlap in descriptions existed from that time forward. (R. 137).

Three witnesses for the Judds testified that since 1953 the existing fence had been relocated at least three different times, in 1958, 1977 and 1978, and that it had at various times been constructed of different materials, iron posts with barbed wire and cedar posts with pine, and that it had at one time abutted the barn and at other times run 4-6 feet from the barn. (R. 154-56, 160, 170-72, 193-94, 197).

Taxes have always been paid by the Judds to the most northern boundary line set forth in the Judd deed. (R. 156). The Judds were informed long ago by Mr. Liechty, an owner prior to the Hutchings and Shermans, that the fence line was not correct. (R. 158). After having a survey done by Mr. Cole, Mr. Hutchings requested that Judds sign a quit claim deed giving Hutchings the property to the fence line claiming that there was a mere four feet difference, whereupon Judds consulted Mr. Cole and the survey and found there to be a 56-58 feet difference. (R. 173).

The trial court held for the defendants, Hutchings, and ruled on the basis of the doctrine of boundary by acquiescence, thus placing the boundary on the fence line. (R. 86-89).

The Findings of Fact and Conclusions of Law and Judgment were signed on January 23, 1986 (R. 102-109) and the Judds filed their Notice of Appeal on February 21, 1986. (R. 114).

SUMMARY OF THE ARGUMENT

The law in Utah regarding boundary disputes is set forth in Halladay v. Cluff, 685 P.2d 500 (Utah 1984). There, the Court stated its desire to enhance reliance upon property dimensions set forth in county records. Because of the weight given to record title, the availability of survey information in platted areas, and advances in survey technology, greater reliance upon record title information and lesser reliance upon boundary by acquiescence is mandated. Furthermore, this Court relegated the status of the doctrine of boundary by acquiescence to an exception to the rule, that exception being that "only when it is not reasonable to expect landowners to ascertain the true location of the boundary by [record title information] should landowners be allowed to claim boundary by acquiescence." 685 P.2d at 505.

In the instant case, a survey was performed, upon which both parties stipulate reliance. The only issue properly before the trial court was which of the two deed lines was correct. Boundary by acquiescence should not have been considered. The deed descriptions overlap and the error is traceable back to the original patents of 1833 and 1884. The Judd property was first deeded out and outlined in 1883, prior to the Hutchings property. That fact is not disputed. The trial court should not have even reached the question of boundary by acquiescence; however, once

addressed, the elements of boundary by acquiescence were not met. The fence line upon which Hutchings claimed boundary by acquiescence has been moved several times over the years, and as recently as 1978. Clearly, this does not meet the 20 years required for boundary by acquiescence. Further, the Judds were aware that the fence line did not represent the boundary line and, therefore, there was never a mutual acquiescence.

Clearly, the mere fact of a fence line does not establish boundary by acquiescence, especially where there exists a reliable survey and reliable evidence as to priority of title.

ARGUMENT

POINT I

THE ONLY ISSUE PROPERLY BEFORE THE TRIAL COURT WAS WHICH OF TWO DEED LINES WAS CORRECT AND, THEREFORE, BOUNDARY BY ACQUIESCENCE SHOULD NEVER HAVE BEEN CONSIDERED.

This Court has set forth the law regarding boundary disputes in the cases of Halladay v. Cluff, 685 P.2d 500 (Utah 1984), Stratford v. Morgan, 689 P.2d 360 (Utah 1984), and Parsons v. Anderson, 690 P.2d 535 (Utah 1984).

In the leading case, Halladay v. Cluff, Justice Oaks, writing for the majority, was careful to clarify and distinguish preceding cases which had created "considerable confusion" regarding the doctrine of boundary by acquiescence.

First, this Court stated that "the law clearly gives precedent to the record title with boundary by acquiescence being an exception."

Second, it was clearly set forth in Halladay that there must be a showing of uncertainty or dispute as to the boundary line.

Third, "dispute" is not proved by a mere difference of opinion.

In writing the Halladay decision, this Court defined the parameters within which the doctrine of boundary by acquiescence could be used. The Court considered two worthy but sometimes conflicting interests: 1) a desire to confirm boundaries that have been recognized on the ground over a long period of time, and 2) the desire to enhance reliance upon the property dimensions shown in county records. The Court concluded that based upon the weight the law clearly gives to record title, the availability of survey information in platted areas, and the advances in survey technology, greater reliance on record title information and lesser reliance on boundary by acquiescence should be the governing standard.

> In general, when survey information is reasonably available . . . so that it is reasonable to expect the parties to locate their boundary on the ground by surveys, the court should be less willing to apply the doctrine of boundary by acquiescence. Halladay at 504.

As set forth above, this Court relegated the status of the doctrine of boundary by acquiescence to an exception to the rule, that exception being that "only when it is not reasonable to expect landowners to ascertain the true location of the boundary by [record title information] should landowners be allowed to claim boundary by acquiescence. Halladay at 505.

The burden of proof as to any uncertainty of boundaries, which must be met before the elements of boundary by acquiescence can be considered, is placed upon the party claiming boundary by acquiescence. Halladay at 507.

In the instant case, there is no uncertainty as to the true location of the boundaries between the Judd and the Hutchings property. The Cole survey clearly shows the deed description of the Judd property and the deed description of the Hutchings property. The parties stipulated as to the accuracy of the survey. The trial court need have only determined, according to the evidence, which deed had priority. The testimony was undisputed that the Judd property and corresponding description was first, originally from the 1833 patent, with the Judd property in 1834.

As in the Halladay case, "the evidence clearly shows that both claimants had ready access to deeds and had actually examined surveys clearly establishing the [plaintiffs'] record title to

the property in dispute. Consequently, the doctrine of boundary by acquiescence is inapplicable as a matter of law . . ."

Incidentally, this Court noted that when boundary by acquiescence was first introduced in Utah a century ago, Switzgable v. Worseldine, 5 Utah 315, 15 P. 144 (1877), much of the state had not been surveyed and searches of record title were difficult to conduct. Halladay at 504. Here, the property in dispute is in a platted area, the parties stipulated as to the accuracy of the survey and the only question is which deed line should be acknowledged. The fence line should not even have been a choice because the Hutchings did not meet their burden of showing an "objective uncertainty."

The Judds submit that even the choice of the Hutchings' deed line would have been more legally sound than to have chosen the fence line.

POINT II

THE ELEMENTS OF BOUNDARY BY ACQUIESCENCE HAVE NOT BEEN MET.

In Stratford v. Morgan, 689 P.2d 360 (Utah 1984), the parties acquired adjoining tracts of land from a common grantor on the same day in 1904. A fence had existed along a boundary, but the plaintiff's predecessor constructed a new fence somewhat south of the boundary line. He used the small lane between the fences to drive his cattle from a corral that had been construct-

ed. Some years later, the original fence and corral were torn down and later, plaintiff put up another fence. Citing Ringwood v. Bradford, 2 Utah 2d 119, 269 P.2d 1053 (1954), this Court stated that:

> The theory under which a boundary line is established by long acquiescence along an existing fence line is founded on the doctrine that the parties erect the fence to settle some doubt or uncertainty which they may have as to the location of the true boundary, and they compromise their differences by agreeing to accept the fence line as the limiting line of their respective lands. The mere fact that a fence happens to be put up and neither party does anything about it for a long period of time will not establish it as the true boundary.

In the instant case, the fence line was not erected to resolve a boundary dispute, and in fact, the fence never for certain represented the boundary because, as testified to by three separate witnesses, it was moved a number of feet on at least three occasions over the years.

One witness testified that the fence was taken down in 1958, in 1977 and in 1978. At one time, an existing ditch was transformed into a cement ditch and this construction caused the fence to be moved several feet. (R. 154-6, 172). Further, the fence was originally placed a few feet north of where it now stands, but it was moved closer to the Judd barn in 1978 because snow

continually fell off the roof and knocked the fence over. (R. 170-171, 193-194).

> A boundary line, to be established by acquiescence, must be definite, certain, and not speculative. Fuoco v. Williams, 18 Utah 2d 282, 421 P.2d 944 (1966).

Furthermore, one witness testified that during the time that the fence was being repaired and moved, he had spoken to a prior owner of the Hutchings property, a Mr. Liechty, who stated that it did not really matter too much where the fence was located because the fence was not on the correct deed line and would need to be moved further onto the Hutchings property.

Although the trial court should not even have reached the question of boundary by acquiescence because the Hutchings did not meet their burden of proof as to uncertainty, it is clear that the existing fence line should not have been utilized for boundary by acquiescence since it has been moved several times and was never intended to be the boundary line.

Further, since the fence line has been altered by more than a few feet as recently as 1977 and again in 1978, the boundary line does not meet the element of "a long period of time" which has been defined as at least 20 years. Halladay at 503, Parsons v. Anderson, 690 P.2d 535, 538 (Utah 1984).

POINT III

TESTIMONY AS TO A PRIOR CONVERSATION WITH THE HUTCHINGS' PREDECESSOR WAS ADMISSIBLE AS AN EXCEPTION TO THE HEARSAY RULE.

The Judds presented evidence through testimony of a member of the Judd family who stated that while the fence was being repaired and moved, he had spoken with a Mr. Liechty, a prior owner of the Hutchings property. Mr. Liechty stated that it did not really matter too much where the fence was located because the fence was not on the correct deed line and would need to be moved further onto the Hutchings property. At trial, the defendants, the Hutchings, objected to this proffer on the grounds of hearsay. The Judds submit that this evidence is admissible as an exception to the hearsay rule.

In the case of Roach v. Dahl, 35 P.2d 993 (Utah 1934), the issue revolved around a proper location of a section cornerstone. After examining the facts, the Utah Supreme Court stated that "hearsay evidence is admissible in a case of this kind to prove the location of a corner or boundary line." The Court did not supply its own reasoning for this rule but did cite the Washington case of Inmon v. Pearson, 92 P. 279 (Wash. 1907).

In the Inmon case, the Court, in discussing the reasoning behind the exception to the hearsay rule, stated:

> In the United States hearsay evidence is admissible both upon questions of boundary

> affecting public rights and also in the case of disputes as to boundaries between private landowners.

This rule is also set forth by Greenleaf on Evidence, Section 170. Further, in Boardman v. Lessees of Reed, 6 Pet. (U.S.) 328, 8 L.Ed. 415, the Supreme Court of the United States, speaking through Mr. Justice McClean, said that:

> Boundaries may be proved by hearsay testimony is rule well settled and a necessity of propriety of which is not now questioned. Some difference of opinion may exist as to the application of this rule, but there can be none as to its legal force.

See also, Jones on Evidence, Section 9.1, Declarations as to Private Boundaries, and Wigmore on Evidence, 3d Ed. Section 1563.

The testimony in question is pertinent to establish that the fence line was never relied upon in mutual acquiescence.

POINT IV

PRIORITY OF TITLE IS FOUND IN THE JUDD TITLE.

As set forth above, because the only issue properly before the trial court was to determine which of the two deed lines was correct based upon priority of title, it is necessary to address the Hutchings' claims of merger of title.

Undisputed testimony at trial, that of Glen Christensen, of Provo Land Title Company, revealed that the Judd property was deeded out of a U.S. land patent in 1833 and that the Hutchings'

property was so deeded in 1884. (R. 135-7). His testimony was based upon computer plotted maps from the Utah County Plat Department and based upon record titles. (R. 138). The overlap in descriptions was created at the time of the patent and has existed since the patent.

He further testified that a Mr. Willis Strong was once the owner of both parcels of ground. He deeded out both parcels of ground using the same legal description that came from the patent. He deeded out the Hutchings' property prior to deeding out the plaintiffs' property; however, it is the position of the plaintiffs that this was immaterial in that there was not a merger of title in view of the fact that the same legal description came in as went out and that the same conflict in descriptions existed.

Further, it is axiomatic that in property disputes, that where there exists a clash of boundaries in two deeds from the same grantor (in this instance, the 1833 and 1834 grants from the United States patent), the title to the first deed executed is superior. Groenwald v. Camano Bluepoint Oyster Co., 81 P.2d 826 (Wash. 1938).

CONCLUSION

The only question properly before the trial court was to determine which deed line title should have been quieted. The

Judds submit that even title quieted in the Hutchings' deed line would have been preferable to title quieted in a fence line which has been moved over the years and which was never intended to be a property boundary.

Based upon the 1833 patent, appellants respectfully seek a reversal with title quieted based upon the Judd description.

RESPECTFULLY SUBMITTED this 12th day of June, 1986.

DATED this 18th day of June, 1986.

DON R. PETERSEN, for:
HOWARD, LEWIS & PETERSEN
Attorneys for Appellants

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was mailed to the following, postage prepaid, this 18th day of June, 1986.

Mr. Michael J. Petro
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DON R. PETERSEN

ADDENDUM

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Our File No. 15,383

Attorneys for Plaintiffs

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

CLAIR W. and GLADYS JUDD FAMILY LIMITED PARTNERSHIP, Plaintiffs, vs. BERNELL L. HUTCHINGS, MRS. BERNELL HUTCHINGS, RONALD J. SHERMAN and MRS. RONALD J. SHERMAN, Defendants.	**STIPULATION** Case No. 69,183

COME NOW the parties of the above-entitled action and stipulate through their attorneys of record that in order to simplify the trial of this case, that the following facts are admitted as being true and accurate.

1. Donald C. Cole is a licensed, registered land surveyor who has surveyed the properties of the plaintiff and the defendant.

2. Set forth on Exhibit "A", which Exhibit is attached hereto and incorporated herein by reference is a photostatic copy of part of Donald C. Cole Survey.

3. That in respect to the dispute over the property on the west side of the defendant's property, which is marked from Point "A" to Point "G" in blue,

there is no dispute as to the proper boundary and title to the property can and shall be quieted in the name of the plaintiff on the deed line which deed line is marked in blue. That the defendants' claim no right, title, or interest beyond the deed line designated in blue Point "A" to Point "G". The plaintiffs may move the fence that now exists from its present location to the deed line description designated in blue from Point "A" to Point "G".

4. That the issues to be tried by the Court involve the property designated as a southern portion of the defendants' property and the northern portion of the plaintiffs' property. There are set forth certain colored markings which are indicated as follows:

a. Point "A" to Point "B" in black is the present fence line.

b. Point "C" to Point "D" designated in red, is the Hutchings' deed line.

c. Point "E" to Point "F", in yellow, is the Judd deed line.

5. The issue before the Court and to be resolved by the Court is the question, what is the proper boundary between the plaintiffs' and the defendants' property, that is, should it be at the present fence line designated in black, Point "A" to Point "B", should it be the Hutchings' deed line, designated as Point "C" to Point "D" in red, or whether it should be the Judd deed line, designated in yellow, from Point "E" to Point "F".

6. A further issue to be resolved by the Court is in the event the Court determines that the correct boundary line is not at the current fence line, who pays for the expenses of moving the fence to its correct location?

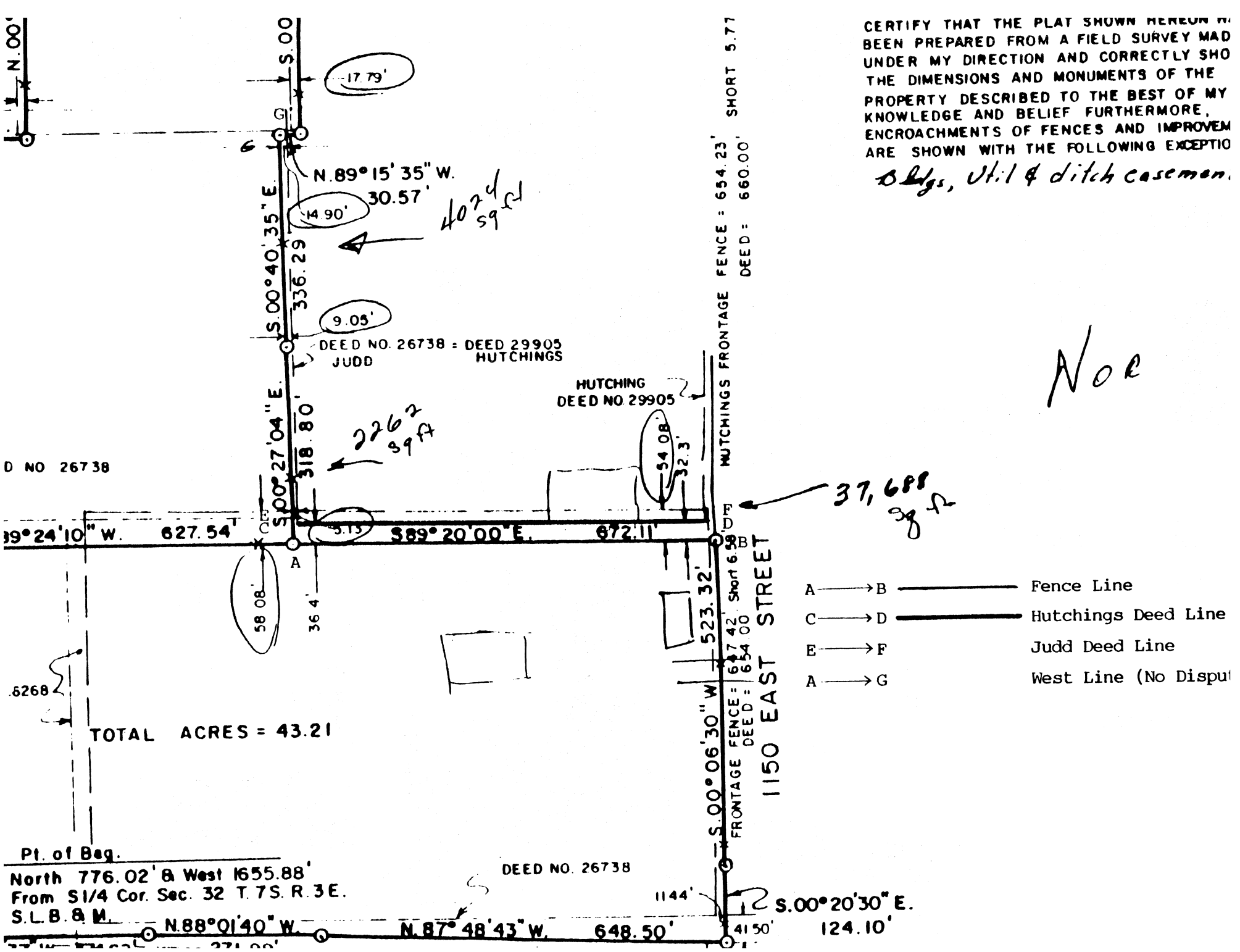
7. The last issue to be determined by the Court is what, if any, damages have the plaintiff's suffered in respect to the disputed boundary line?

DATED this 3 day of ~~August~~ September, 1985.

DON R. PETERSEN, for
HOWARD, LEWIS & PETERSEN
Attorneys for Plaintiffs

DATED this 3 day of ~~August~~ September, 1985.

MICHAEL J. PETRO, for
Attorneys for Defendants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PROPERTY DESCRIBED TO THE BEST OF MY
KNOWLEDGE AND BELIEF FURTHERMORE,
ENCROACHMENTS OF FENCES AND IMPROVEM
ARE SHOWN WITH THE FOLLOWING EXCEPTIO
Bldgs, Util & ditch easemen
N.00'
S.00
17.79'
G
6
N.89°15'35"W.
30.57'
14.90'
402 sq ft
S.00°40'35"E.
336.29
9.05'
DEED NO. 26738 = DEED 29905
JUDD
HUTCHINGS
S.00°27'04"E.
318.80'
2262 sq ft
HUTCHING
DEED NO. 29905
34.08'
32.3'
HUTCHINGS FRONTAGE FENCE = 654.23' SHORT 5.77'
DEED = 660.00'
D NO 26738
37,688 sq ft
E
5.13'
S89°20'00"E. 672.11'
D
B
A
39°24'10"W. 627.54'
58.08'
36.4'
523.32'
Short 6.58'
647.42'
654.00'
1150 EAST STREET
.6268
TOTAL ACRES = 43.21
FRONTAGE FENCE = 647.42' Short 6.58'
DEED = 654.00'
S.00°06'30"W.
Pt. of Beg.
North 776.02' & West 1655.88'
From S1/4 Cor. Sec. 32 T.7S. R.3E.
S.L.B.&M.
DEED NO. 26738
1144'
S.00°20'30"E.
124.10'
N.88°01'40"W.
N.87°48'43"W. 648.50'
41.50'
A → B Fence Line
C → D Hutchings Deed Line
E → F Judd Deed Line
A → G West Line (No Dispu